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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
Petitioners,
v.

GENERAL ELECTRIC COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR GENERAL ELECTRIC COMPANY

Of Counsel:

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

THEOPHIL C. KAMMHOLZ
STANLEY R. STRAUSS
NINA G. STILLMAN
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN S. BATTLE, JR.
J. ROBERT BRAME, III
1400 Ross Building
Richmond, Virginia 23219

Attorneys for General Electric Company

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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REPLY BRIEF FOR GENERAL ELECTRIC COMPANY

I. RESPONDENTS' ASSERTIONS THAT GE WAS MOTIVATED BY A DISCRIMINATORY ATTITUDE TOWARD FEMALE EMPLOYEES ARE WITHOUT MERIT.

Respondents[1] assert (Resp. Br. 11, 73, 86-101, 144) that the exclusion of pregnancy from GE's sickness and accident coverage was motivated by a generally held, and historically shown, discriminatory attitude by GE toward female employees. They further assert (Resp. Br. 11, 73-74, 86, 87, 97) that the district court so found, and that GE has not challenged the district court's findings in this respect. It is clear (see Resp. Br. 97-98) that these assertions are made by Respondents in an attempt to establish that the pregnancy exclusion here in issue is "pretextual" in origin,[2] and that Respondents would thereby remove this case from the controlling principle of *Geduldig* that the exclusion of pregnancy from coverage under a disability program does not discriminate on the basis of sex unless it is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other" (417 U.S. at 496-497, n. 20). Respondents' assertions, however, are plainly without merit.

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[1] As set forth in GE's main brief (n. 2, p. 2), the parties agreed that, subject to the Court's approval, GE would be treated as petitioner with respect to briefing and argument before the Court; and that the parties have been informed by the Court's Clerk to proceed as thus agreed.

[2] In this connection, Respondents contend (Resp. Br. 100) that GE's opposition to the judgment below is predicated upon an effort to maintain in being a discriminatory, but profitable, wage system. Neither the record, however, nor any finding by the courts below supports this contention.

First, only the pregnancy exclusion was attacked in the complaint (I App. 17-26). The complaint charged no other violation of law by GE; attacked no other GE employment practice, or term or condition of employment whether past or present, or whether involving male or female employees; and in no way alleged either general, or specific, bias against female employees on GE's part. Consequently, only the pregnancy exclusion, and no other matter pertaining to GE, whether present or past, was in issue before the district court.

Second, the district court recognized that GE's past history with respect to treatment by GE of its female employees—much of it, moreover, sought to be shown by Respondents through the grossest hearsay and innuendo (e.g., see Resp. Br. 19-21, 96)—was irrelevant to this case. Thus the district court said (Jt. Pet. 26a):

> Plaintiffs have introduced much evidence in an effort to demonstrate the GE's past history is dominated by a strain of male chauvinism. The Court deems that line of inquiry *legally irrelevant and makes no findings with respect to this contention* [emphasis added].

In view of this statement by the district court, Respondents' present assertions concerning the district court's findings border on the frivolous—especially as Respondents, citing the foregoing statement by the district court, are asserting in this Court that the district court erred in refusing to consider what they term as "pre-Act" events.[3] See Resp. Br. 154-

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[3] Respondents, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971), *Albemarle Paper Co.* v. *Moody*, 94 S.Ct.

155. In any case, moreover, events that allegedly transpired in the 1920's and 1930's (see Resp. Br. 19-20, 73, 87-88) have no probative relevance regarding the issue that is here presented. And while perhaps interesting, what GE's Swope said "[i]n a nationwide radio address, given in 1931 . . ." (Resp. Br. 19) is of no consequence in this lawsuit.

Third, Respondents, at Br. 97, have seized upon, and distorted out of context, language in the district court's Opinion to make it appear that the district court found that the pregnancy exclusion was motivated by a general "discriminatory attitude" on GE's part against female employees. The district court did, indeed, in the context of a discussion of the cost to GE of adding pregnancy coverage say that "the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivat-

2362, 2367 (1975), and *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 95 S.Ct. 2223, 2226 (1974), contend that the district court erred in refusing to consider so-called "pre-Act" events. It is submitted, however, that the district court's ruling in this connection was entirely correct. The cases Respondents cite concern the perpetuation of the effects of pre-Act discrimination despite employer attempts to comply with the respective anti-discrimination laws involved after their enactment. (In *Griggs* and *Albemarle* the Act involved was Title VII of the Civil Rights Act of 1964; *Corning Glass* was a suit brought under the Equal Pay Act.) Thus, "historical" evidence was not only directly related to the issues litigated in those cases, but was essential to demonstrate the perpetuation from pre-Act times of the specifically charged unfair employment practices. The issue in this case, however, does not involve the perpetuation of the effects of pre-Act discrimination despite intended post-Act compliance; thus the allegedly pre-Act events Respondents cite are not directly related to the narrow unfair employment practice charged in the complaint.

ing factor in [GE's] policy" (Jt. Pet. 32a).[4] The district court, however, in fact made no other findings "elsewhere" in its Opinion in which it so "characterized" GE's attitude, and the words in question accordingly appear singularly unsupported and ill-chosen. A fair reading, moreover, of the entire Opinion sets these bounds on its scope: (1) The district court did *not* find that GE, independently of the pregnancy exclusion, either was discriminatorily motivated against female employees, or adopted the exclusion because it was so motivated; and (2) the district court *did* find, narrowly, that by the very fact of having adopted the exclusion, which was "inextricably sex-linked" (Jt. Pet. 29a), GE in effect demonstrated a discriminatory attitude toward female employees. Certainly, the broad sweep that Respondents attribute to the district court's decision is totally at variance with its careful conclusionary delineation (Jt. Pet. 37a):

> The claim here is not of disparate treatment resulting from sex stereotyping, a claim now familiar in Title VII litigation. See, e.g., *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). Rather, it is a claim of disparate

[4] In full, the district court said (Jt. Pet. 32a): "Merely showing, as G.E. has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result. Indeed, the concern of defendants in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other statistically sex-linked disabilities, buttresses the Court's conclusion that the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivating factor in its policy."

> treatment of persons, otherwise similarly situated, on the basis of a particular condition the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked.

Fourth, Respondents assert (Resp. Br. 11, 73, 86-87, 97) that the broad findings of discrimination they erroneously attribute to the district court have gone "unchallenged" by GE. When, however, Respondents made the same erroneous assertions in the court of appeals with respect to the district court's findings as they now make in this Court, GE in fact "challenged" them in a Reply Brief filed in the court below. In such brief, GE set forth (pp. 8-11) substantially the same response as is here set forth. More importantly, the majority of the court of appeals, as Respondents admittedly recognize (Resp. Br. 11, 86-87, 154), did not rest their opinion on the predicate that the pregnancy exclusion was motivated by a discriminatory attitude by GE toward its female employees. Accordingly, to say, as Respondents now do, that GE did not challenge a finding that was in fact not made by either of the courts below borders on the absurd.

Finally, as set forth at pp. 6, 15, 55-61 of its main brief, GE has amply demonstrated that its decision to exclude pregnancy-related disabilities from sickness and accident coverage was neither arbitrary [5] nor

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[5] One of the reasons underlying GE's adoption of the pregnancy exclusion is its fear that the payment of pregnancy benefits would precipitate a "demand for child care leave for men," i.e., for "a kind of allowance for some period of child care" (II App. 601). The district court mistakenly took this to mean that GE anticipated that such demand would be made

discriminatorily motivated;[6] conversely, GE has shown affirmatively that its decision was based on sound business considerations and good faith reliance upon governmental interpretations of Title VII and related acts. In short, under any criterion, the record conclusively establishes that the pregnancy distinctions in GE's sickness and accident plan are *not* "mere pretexts designed to effect an invidious discrimination" against female employees. *Geduldig*, 417 U.S. at 496-497, n. 20.[7]

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under the disability insurance plan itself (Jt. Pet. 24a), but, of course, this was not the thrust of the pertinent testimony at II App. 601. Respondents mistakenly assert (Br. 94), therefore, that this was "a particularly spurious contention by GE."

[6] Respondents style the cancellation of sickness and accident coverage during pregnancy absences as "vindictiveness towards females" (Br. 98). Respondents overlook, however, the fact that GE experiences a 40 percent non-return rate among its female employees who are absent to have babies (see n. 6, p. 7 of GE's main brief)—a fact which clearly justifies this policy. (Compare the nation-wide non-return rate of 50 percent. See GE's main brief, p. 9; II App. 532.) In this connection Respondents further assert (Br. 98) that GE has deliberately discouraged female employees from returning to work after childbirth. But this assertion ignores Article VII, Paragraph 2(a) (3) of the 1970-1973 GE-IUE National Agreement, to which Respondent IUE is party, which provides that service credits and continuity of service will be lost whenever an employee: "Is absent from work because of personal illness or accident and fails to keep his supervisor notified monthly, stating the probable date of his return to work. *In cases of pregnancy the first such notification must be given not later than eight weeks after termination of pregnancy*" [emphasis added] (Pls.' Exh. 5, not reproduced in Appendix).

[7] Respondents seek to demonstrate that the exclusion of pregnancy from GE's weekly sickness and accident insurance

II. THERE ARE A NUMBER OF ERRONEOUS CONTENTIONS AND STATEMENTS BY THE SOLICITOR GENERAL AND RESPONDENTS WHICH REQUIRE COMMENT.

Below we comment upon a number of the erroneous contentions and statements in the briefs filed by the Solicitor General and Respondents:

A. The Solicitor General, contending that the failure to cover pregnancy under disability insurance plans constitutes a *prima facie* violation of Title VII, predicates his argument on a number of distinguishable and inapposite sex discrimination cases: e.g., *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991; *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Rosenfeld* v. *So. Pacific Company*, 444 F.2d 1219 (9th Cir. 1971).[8] The cases

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coverage is one more example of GE's discriminatory attitude toward females. See Resp. Br. 11-16, 17-23, 37-41, 47-55. However, such an argument is clearly without merit. Indeed, in all the benefits provided by GE, male and female employees participate equally. These benefits consist of the following: an emergency aid plan, an income extension aid plan, a savings and security program, a savings and stock bonus plan, a vacation plan, a product purchase plan, a suggestion plan, a pension plan, a medical care plan for pensioners, a savings plan, a personal accident insurance plan, a military pay differential plan, and an insurance plan which includes medical, hospital and surgical insurance, life insurance, weekly sickness and accident insurance, and accidental death or dismemberment insurance. See, I App. 173-175; II App. 609-610; III App. 1060-1061.

[8] The Solicitor General cites with approval (Sol. Br. 21) *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), upholding a state

relied on by the Solicitor General establish two broad principles, neither of which has relevance in this case. The first such principle is that an employer may not treat members of one sex differently from members of the other with respect to matters directly affecting employment opportunities.[9] Thus, for example, *Sprogis*, *supra*, held that an employer could not treat marriage as a relevant employment criterion for women but not men, when to do so would affect the rights of women to compete for jobs on an equal basis.

The second such principle is that employers may not utilize sexual stereotypes in making employment

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restriction on bartending by women, and *West Coast Hotel Co.* v. *Parish*, 300 U.S. 379 (1937), upholding a state minimum wage law for women, in attempting to show that Title VII is much less tolerant of disparate treatment of the female sex than is the Fourteenth Amendment. The short answer, of course, is that these cases represent an outmoded conception of social justice based on the climate of a different day, and therefore they ought not to be regarded as establishing Equal Protection standards for this day. As Judge Knapp stated in *Communication Workers* v. *American Telephone & Telegraph Co., Long Lines Dept.*, 379 F. Supp. 679, 683 (S.D. N.Y. 1974), *rev'd* 513 F.2d 1024 (2nd Cir. 1975), *pet. for cert. pending*, No. 74-1601, in response to the same argument: "The cases cited . . . are in our view more readily explained by the respective dates of decision than by the rubric under which they were decided . . . . It seems a safe guess that, in light of *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542, 3 FEP Cases 40, and *Sprogis* v. *United Air Lines* (7th Cir. 1971) 444 F.2d 1194, 3 FEP Cases 621, cert. den. 404 U.S. 991, 4 FEP Cases 37, both *West Coast Hotel* and *Goesaert* would be decided differently today."

[9] As Judge Widener stated in his dissenting opinion below (Supp. Br. Jt. Pet. 14a): "Title VII seeks to equalize opportunities, not to create an advantage for either men or women."

decisions. Thus, for example, *Martin Marietta*, *supra*, held that an employer could not maintain a hiring policy which denied employment to women with pre-school-age children, but did not similarly treat similarly situated men. See also *Sprogis*, *supra*. Cases such as *Bowe*, *supra*, *Weeks*, *supra*, and *Rosenfeld*, *supra*, which deal with the presumed physical capabilities and physical limitations of women as affecting their eligibility for employment, are also illustrative of instances of impermissible sexual stereotyping.

This case, of course, does not involve the denial of employment opportunities to women. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this case. Nor does this case involve, despite the apparently contrary contention of the Solicitor General, a case of alleged discrimination on the basis of a sexual stereotype. Not all women can or want to become pregnant (see GE's main brief, p. 67); and to say, as Respondents do (Resp. Br. 78), that "[a]fter all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female," not only misstates the matter factually but also misconstrues the issue in this case. Thus, as stated to this Court at p. 2 of Appellant's (California's) Reply Brief in *Geduldig*:[10]

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[10] At page 15 of Appellant's Reply Brief in *Geduldig*, it was pointed out to the Court that under California's experience claims for disability attributable to pregnancy "average[d] 15 weeks duration." This is in line with the national and GE's experience (see GE's main brief, p. 9 and n. 10), and contrasts with Respondents' 6-8 weeks position (Resp. Br. 144).

[Footnote continued on page 11]

> Appellees do a disservice to women when they make pregnancy the *sine qua non* of being woman. Surely it is common observation that a large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and childrearing, and to place on equal footing the woman who, through choice or chance, is childless. Childbearing capacity is not an essential or universal or lifelong female trait.

B. The Solicitor General asserts (Sol. Br. 24-26) that Congressional approval of the current EEOC guideline regarding the treatment of pregnancy as a temporary disability can be inferred from legislative history related to the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, and the subsequent promulgation, in 1975, by the Department of Health, Education and Welfare of regulations dealing, *inter alia*, with pregnancy as a temporary disability. This assertion is based upon the fact that the 1974 Education Amendments provide that regulations promulgated by HEW, which implement Title IX of the

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[10] [Continued]

It is GE's position that pregnancy is a voluntarily induced condition which can either be avoided through the use of contraceptive devices or terminated through abortion. See GE's main brief, p. 64. GE's position concerning the voluntary nature of pregnancy is seemingly disputed by Respondents (Resp. Br. 93). Supportive of GE's position is an article that appeared on the front page of the January 3, 1976 New York Times which stated that "[t]he United States is approaching the point at which, statistically, all of its legitimate babies will be wanted at birth." The Times quoted the author of a study published in the January 9, 1976 issue of "Science," that "[w]e are coming closer and closer to the perfect contraceptive population."

Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, must be submitted to Congress 45 days prior to their implementation, and the contention based thereon that Congress allegedly failed to disapprove 1975 HEW regulations after their submission to the Congress.[11] The Solicitor General's assertion is faulty, however, as we show below.

First, there is no indication that the House or its members ever considered the corpus of the 1975 HEW regulations during the 45 day period after their publication on Wednesday, June 4, 1975 (and their presumed submission to Congress on or about that date),[12] much less the specific regulation (29 C.F.R. Sec. 86.57(c)) dealing with the treatment of pregnancy disabilities. Moreover, the Solicitor General's reference (Sol. Br. 26, n. 22) to proceedings before the House on December 19, *1974* (a date clearly prior to the submission of the 1975 regulations to the House) is not only misleading, but it shows nothing more than the general opposition of certain House members to the application of the sex discrimination

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[11] A similar argument is made by Respondents. See Resp. Br. 129-130.

[12] Section 509(d)(1) of Public Law 93-380, 88 Stat. 567, requires that regulations implementing Title IX shall be transmitted to the House and Senate *concurrently* with their publication in the Federal Register.

HEW regulations concerning nondiscrimination on the basis of sex in education programs, of which the specific regulation cited by the Solicitor General is a part (Section 86.57(c)), were published in the Federal Register on Wednesday, June 4, 1975. 40 Fed. Reg. 24128-24144. (See also 121 Cong. Rec. S. 13175 (daily ed., July 21, 1975)). The regulations became effective on July 21, 1975. See 40 Fed. Reg. 24128.

provisions of Title IX to such voluntary service or social organizations as the Boy Scouts, Campfire Girls, and college social fraternities. See 120 Cong. Rec. H. 12331-12336 (daily ed., December 19, *1974*).

Second, notwithstanding the provision for transmission of HEW regulations to Congress 45 days before they become effective, the Senate was never offered the opportunity to disapprove the 1975 regulation relied on by the Solicitor General. Senator Helm's introduction, on June 5, 1975, of a resolution [13] to disapprove the newly proposed HEW regulations in their entirety was referred to the Senate Committee on Labor and Public Welfare. 121 Cong. Rec. S. 9713-9715 (daily ed., June 5, 1975). Thereafter, the Committee declined to report the resolution to the full Senate. 121 Cong. Rec. S. 13176 (daily ed., July 21, 1975). Thus, the Committee's action precluded the Senate from voicing either its approval or disapproval of the regulations. Moreover, even assuming, *arguendo*, that the Committee's action could somehow be construed as the consensus of the

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[13] Senator Helms' resolution, S. Con. Res. 46, recited (121 Cong. Rec. S9715 (daily ed., June 5, 1975)):

> *Resolved by the Senate (the House of Representatives concurring)*, that pursuant to the provisions of section 431(d) of the General Education Provisions Act, the Congress of the United States finds that the regulations of the Department of Health, Education, and Welfare relating to non-discrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance (40 F.R. 21128) [sic] are inconsistent with the provisions of Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1686), and disapproves such regulations which were transmitted to the Congress on June 3, 1975.

Senate, such "rejection" of Senator Helm's broad proposal hardly furnishes proof that the particular HEW pregnancy disability regulation upon which the Solicitor General relies received Senate approval. See, *Connell Construction Co.* v. *Plumbers & Steamfitters*, —— U.S. ——, 44 L.Ed.2d 418, 433, n. 16 (1975).

In short, there is no meaningful legislative history regarding the adoption of the HEW's pregnancy disability regulation which evidences Congressional approval of the EEOC guideline at issue here.

C. Respondents contend (Resp. Br. 121) that it is appropriate to look to the legislative history of the Equal Pay Act (29 U.S.C. 206(d)) in construing Title VII. Authoritative interpretations of the Equal Pay Act, which are clearly inconsistent with the position Respondents advocate, show, however, that the legislative history of the latter Act cannot be accorded weight in construing Title VII. Thus, as set forth in GE's main brief, p. 46, regulations promulgated by the Wage and Hour Administrator, Department of Labor,[14] pursuant to the Equal Pay Act have consistently provided that payments relating to maternity are not wages for purposes of that statute (29 C.F.R. § 800.110), and further state (29 C.F.R. § 800.116 (d)):

> If employer contributions to a plan providing insurance for similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

See also, Wage-Hour Opinion Letter dated May 27, 1964 (BNA WHM 95:608-609). Because this has been a *consistent* interpretation by the agency authorized with the Equal Pay Act's enforcement, it is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971).

In these circumstances, and assuming on the other hand that the Equal Pay Act's legislative history does have relevancy with respect to Title VII, it almost necessarily follows that the EEOC's 1972 guideline on pregnancy stands as a misinterpretation of Title VII. In this connection, it is also worthy of note that GE has never committed an Equal Pay Act violation. Indeed, in the only two cases brought against GE under the Equal Pay Act, the courts held

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[14] As is also noted in GE's main brief, pp. 45-46, Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173) do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20-3(c)). Although the Solicitor General correctly notes (Sol. Br. 24, n. 20) that the Department of Labor's Office of Federal Contract Compliance has published *proposed* guidelines which would adopt a policy similar to that in the present EEOC guideline on the treatment of pregnancy, the Solicitor General does not advert to the fact that the proposed guidelines were published more than three years ago and no hearings on the proposal have been either held or announced. See GE's main brief, p. 46, n. 50.

in favor of GE. See, *Dunlop* v. *GE* (No. 73-C-156R, E.D. Va., September 16, 1975); *Grimaldi* v. *GE* (No. 74-1555, E.D. Pa., July 24, 1975).

Respondents further assert (Resp. Br. 124-125) that the defeat of the Martin bill and the Findley amendment to the proposed Equal Pay Act demonstrates that Congress rejected efforts which would have "enabled employers who paid sickness and accident benefits to women disabled by pregnancy or hospital and medical expenses connected with maternity or had other special costs attributable to the employment of females, to deduct these additional costs from wages so that the law would not [have] require[d] them to pay both the added cost of maternity benefits and equal pay." However, examination of the texts of the cited bill and amendment (See Resp. Br., p. 134, n. 55) does not support the interpretation Respondents have accorded them.[15]

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[15] At pp. 40-41 of its main brief, GE quotes statements made by Thomas I. Emerson, Lines Professor of Law, Yale Law School, before the Senate and House committees conducting hearings on the proposed Equal Rights Amendment. Seeking to neutralize what they apparently consider damaging statements, Respondents at pp. 134-135 of their brief, refer to an article by Professor Emerson in the Yale Law Journal and claim that the paragraphs they quote demonstrate that Professor Emerson "expressly stated that exclusionary maternity laws would be struck down by the ERA." However, examination reveals that the paragraphs which Respondents quote are clearly out of context. Moreover, the article closely tracks Professor Emerson's statements before Congress which are referred to in GE's main brief. Compare Brown, Emerson, Falk, Freedman, "The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women," 80 Yale L.J. 871, 893-894 (1971) with Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 298-299 (1970).

III. RESPONDENTS' BRIEF DISTORTS THE RECORD.

Respondents' brief is replete with statements that are factually wrong or misleading, or which are based on purported facts that are not part of the record. We list below and comment upon some, but not all, such statements:

Statements in Respondents' Brief	Comment
P. 6 States there are "43 individual named plaintiffs" who are employed at GE plants in Richmond, Portsmouth and Salem, Va.; Tyler, Texas; Fort Wayne and Tell City, Ind.; and, Phil., Pa.	The individually named plaintiffs number 7; all are employed at GE's Salem, Va., plant (I App. 18). Plaintiffs' motion to add parties plaintiffs (I App. 38-42) was denied (I App. 120, 131).
P. 12 States that the maximum of 26 weeks disability pay in GE's Plan reflects the fact that after such period Social Security disability benefits are available, citing 42 U.S.C. 423.	There is no support for this in the record. Indeed, GE's S and A insurance coverage was instituted in 1950 (II App. 583), and the addition of disability insurance benefit payments to the Social Security System did not occur until 1956.
Pp. 12-13 Implies that GE's Long Term Disability Plan might be an issue in this proceeding.	Not only did the complaint not raise the issue of GE's Long Term Disability Plan, but the district court expressly found that such issue had not been raised (Jt. Pet. 4a, n. 1).
Pp. 13, 16-17, 140-141 States that the General Electric Insurance Plan with Comprehensive Medical Expense Benefits is not an insurance plan.	The record demonstrates that GE is clearly insuring its employees against various included risks. See, e.g., I App. 176 ("GE has obtained an insurance policy covering weekly sickness and accident benefits, among others, whereunder a tentative initial premium was paid to Metropolitan Life Insurance Company . . ."). See also, I App. 211, 218-219, 241.

Statements in Respondents' Brief		Comment
Pp.	13-14, 93, 98	States that GE's sickness and accident insurance coverage continues during strikes.	The coverage "automatically . . . terminate[s] on the day immediately preceeding the first full day's absence . . . because of the strike" (III App. 1071). On a number of occasions, GE has opted to continue the insurance during a strike, but it has not always done so (II App. 613-614).
P.	14	States that a male employee on leave of absence has S and A insurance coverage for 31 days.	So, of course, do all *female* employees (II App. 611-612; III App. 1070-1071).
Pp.	15-16, 93 (See also 17-18, 21)	States that male employees are paid S and A benefits for absences due to enumerated causes, such as injuries incurred in sports activities and fights, alcoholism, drug addiction, and nose jobs and hair transplants (cosmetic surgery).	S and A benefits are also paid to *female* employees for absences due to all the enumerated causes. S and A benefits are also provided when female employees are absent for such uniquely female conditions as ovarian cysts, tubal ligations, and uterine cancer. Moreover, with respect to the causes listed by Respondents, more than half are "infinitesimal" and "rarely occur" (I App. 5). A nose job or a hair transplant "is a minimal occurrence . . . a *de minimus* problem" (II App. 608).
Pp.	15-16, 18	Implies that GE's income maintenance programs, and particularly military pay differentials and duty allowances are for male employees only.	This is not so. GE's income maintenance programs, including those pertaining to military duty, are applicable to male and female employees alike (I App. 174-175; Pls.' Exh. 5, pp. 81-83).
P.	20	Refers to "the disability benefits plan initiated in 1925" and over the years described in the annual reports.	Sickness and accident benefits were first provided for GE employees in 1950. See II App. 583.

Statements in Respondents' Brief		Comment
Pp.	21, 23	Citing III App. 1963, Respondents' brief states that GE pays all hospital and medical costs "[i]n order to assure the productivity of male employees," and because "the possibility that worry over the costs of having babies might impair the male employees' ability to concentrate and function to the highest capacity." Respondent further states that "[t]his has recently been extended to cover deliveries for female employees. . . ."	There is not a scintilla of evidence to show that GE pays these costs for the attributed reasons. The GE Insurance Plan states (III App. 1062) that medical expenses are provided to help "you and your dependents;" hospital and medical expenses of both males and *females* are paid. Moreover, the Plan specifically pays maternity benefits—i.e., hospital and doctor expenses, etc.—for female employees as well as for dependent wives (III App. 1063, 1066). GE began paying such benefits in 1950, and since 1966 has provided full hospital and medical expense coverage for pregnancies of female employees and spouses of male employees.
Pp.	22, 21, 37-39	States that maternity expenses are covered by GE's Insurance Plan, "thus accepting delivery as a sickness or accident for the purposes of the hospital and medicare [sic] provisions of the plan."	This is an incorrect statement. Plaintiffs' Exh. 6 (reproduced in part at III App. 1060-1072), containing GE's "Comprehensive Medical Expense Insurance Plan," demonstrates that under the Medical Expense provisions GE pays for medical and hospital expenses incurred as a result of pregnancy (pp. 5, 7, 19-20, not reproduced in the Appendix). However, pregnancy or resulting childbirth or complications in connection therewith are specifically excluded from S and A coverage. III App. 1066.

Statements in Respondents' Brief		Comment
Pp.	24, 29, 36, 40, 88, 99, 144	Referring to a February 1972 GE memorandum re employee Thomas (III App. 10, 14), the brief states that rules in effect at GE's Tyler, Texas plant at that time "were similar to rules theretofore in effect in all GE plants" and required pregnant employees to leave work at the end of the sixth month of pregnancy. At pp. 29, 36, 40, 88, 99, and 144, the brief insinuates that GE presently is maintaining a six or seven months rule.	In July 1964, GE issued a Health Bulletin to all GE plants providing that women can work beyond the sixth month of pregnancy when the pregnancy is uncomplicated (II App. 601-602, II App. 867-870). In November 1971, another Health Bulletin made it clear that pregnant employees could continue to work beyond the sixth month of pregnancy with the approval of their attending physicians (II App. 722-725). A third Health Bulletin, issued May 1972, reaffirmed the latter policy (II App. 726-729). The district court expressly noted that GE's mandatory leave policy existed "prior to late 1971" (Jt. Pet. 22a). (Moreover, as Respondents' brief notes, p. 25, employee Thomas was in fact permitted to work up to the day before her baby was born in April 1972.)
P.	27	In footnote 6, Respondents state that Dr. Wilbanks and Dr. Hellegers testified "that *most* women by two weeks after childbirth are back doing all the same work as pre-pregnancy" [emphasis added].	Respondents have overstated the testimony of both doctors. See II App. 466-467, 687.
Pp.	29, 58	Respondents state that the average male received total temporary disability benefits from GE of $592.23 in 1970 and $623.95 in 1971.	Respondents have ignored the fact the average cost per insured employee of S and A benefits paid by GE were $45.76 for males and $82.57 for females in 1970, and $62.08 for males and $112.91 for females in 1971. See, I App. 198, 227, 260, 278-286.

Statements in Respondents' Brief		Comment
P.	45	States that "a large proportion of the males who draw sickness and accident benefits are never hospitalized."	This statement is completely unsupported by the record.
P.	48	Brief purports to quote the GE Employee Benefits Manager as saying with reference to wages in the steel industry: "[T]hey don't have women; therefore, our average wage is lower."	The full quote is: "Steel isn't comparable. Their work is different and they don't have women; therefore our average wage is lower. They also aren't mechanized like us" (III App. 1037). Moreover, the brief does not show that the statement was made in 1960 (III App. 1034).
Pp.	48, 73-74, 88	Refers to "GE job evaluation manual which expressly provided that women were to be paid one-third less than men for the same work."	Brief fails to point out that this job manual had reference only to GE's Erie Works and was dated May 10, *1937* (III App. 1002).
P.	52	States that "GE is a competitor in the glass industry."	The statement is unsupported. GE glass factories make glass only for GE bulbs and lamps.
P.	53	States that "many of GE's competitors pay benefits for pregnancy disability for six or eight weeks," supporting the statement by reference to Appendix A of its brief.	The statement is unsupported. Of the employers listed in such Appendix A, only two, GM and RCA, are GE competitors (II App. 622-627).
P.	56	States that during 1969 bargaining negotiations with the IUE, GE "negotiated 'only level of benefits, not costs.'"	This statement is controverted by the testimony of Mr. Hilbert, GE's Labor Relations Counsel (II App. 645-647).

Statements in Respondents' Brief		Comment
Pp.	73-74	States that "during the 1940's . . . many employers paid disability benefits for pregnancy-related disabilities usually limited to six weeks duration and justified their low female wages as in part due to the cost of disability benefits for maternity."	There is no record support for this statement.
Pp.	86, 41	States that "[w]here a *male* employee is partially disabled GE assigns him temporarily to another job" (Jt. Pet. 14a) [emphasis added].	The district court found that "GE has on occasion temporarily assigned to other suitable work an employee who is disabled temporarily from performing his *or her* regular job but is not disabled from performing other available work" (Jt. Pet. 14a) [emphasis added].
P.	88	Cites "tables in evidence" to support proposition that GE pay scales show discrimination against all GE female employees, and current female wage rates are less than 75% of male rates.	The "tables in evidence" relate only to employees represented by the IUE (III App. 883-953). Moreover, at page 63 of Respondents' brief, it is stated that "women's rates of pay nationwide are only 60% of those of males." Therefore, if GE's female employees receive wage rates that are approximately 75% of male rates, they would be doing far better than female employees nationwide.

Statements in Respondents' Brief		Comment
Pp.	89, 90	States that "To the extent that GE has based the wage rates it paid women on rates paid by other companies, where the rates of a substantial number of companies were low, in part, because they, in addition, paid temporary disability benefits for pregnancy-related disabilities, GE is trying in effect to have its cake and eat it too." Also states that "[f]or GE to pay the same low wages as other employers in the community . . . ."	There is absolutely no record support for the statement that GE's wage rates are based on what other employers pay.
P.	89	Refers to "[t]he prevalent practice of paying 6 weeks of maternity benefits . . . ."	The record demonstrates there is no such prevalent practice. Only 40% of the work force in the United States is covered by disability insurance and of that 40% covered only 40% of the plans provide a maternity benefit (III App. 846; II App. 529). Therefore, only 16% of the workforce is covered by disability insurance which includes maternity (II App. 529).
P.	92	States that "GE has a 40% turnover rate for all employees (I App. 294). Thus even if 40% do not return from pregnancy, this is only the same number as would quit if not pregnant."	However, the record shows that "approximately half of the female employees who have children do not return to work" whereas generally 100% of those employees who recover from short term disabilities return to work (II App. 532).

Statements in Respondents' Brief		Comment
P.	93 States that "all pregnancies of wives of male employees . . . are paid in full."	This statement is misleading because only the hospital and medical expenses of pregnancies are paid. Moreover, these expenses are not only paid for wives of male employees, but also for female employees.
P.	96 Refers to GE's "persuading American industry" to adopt fringe benefits programs.	There is nothing in the record to support this.
P.	96 Lists objectives achieved by GE in adopting fringe benefits plan.	The record does not support the statement, which is based solely on the wirting of one commentator, Donna Allen.
P.	97 States that "GE's strong opposition to a national social security system has for all practical purposes prevailed."	This statement is unsupported by the record. Moreover, it is blatantly erroneous as the United States Social Security System applies to GE employees as well as employees of other companies.
P.	97 States that "GE's private social security system provides for its employees the kind of social security provided by the government in all industrial nations, except that GE does not cover the risk of loss of income by pregnancy and childbirth which is an integral part of the social security system of all the European countries . . . ."	First, GE is not a European government nor an industrialized nation. Second, GE is not the government of the United States. Third, even the United States Social Security System does not provide S and A for pregnancy.

Statements in Respondents' Brief		Comment
P.	99 Brief quotes from a paragraph summarizing a Prentice-Hall survey purportedly showing a sizable return rate for female employees after pregnancy "when such return to work is facilitated by the employer's extending to them the benefits enjoyed by male employees."	(1) The survey does not correlate female return rates with male benefits (IV App. 1135-1138); (2) the brief fails to note that not all the companies in the survey had statistics available on female return rate (IV App. 1138); and (3) brief deletes the last sentence of the quoted Prentice-Hall paragraph: "On the other hand, some companies reported that only a fraction of employees actually returned after their babies were born . . ." (IV App. 1138).
P.	105 States that on the basis of cited arbitration decisions, "it is apparent that the term sickness is generally accepted in the industrial world as embracing the condition of a woman disabled by childbirth or a complication of pregnancy."	This statement not only lacks support but ignores the contrary record evidence. See, e.g., II App. 529.
P.	107 States that during 1971 the EEOC made a careful study of the medical issues involved in employment of women before and after childbirth.	This is a gratuitous statement, having no record support whatever.

Statements in Respondents' Brief		Comment
Pp. 107-108, 84	States that the EEOC consulted Drs. Barter and Hellegers "and utilized their services as expert witnesses in proceedings instituted by EEOC before the Federal Communications Commission against AT&T . . . ."	Again the statement is unsupported by the record: (1) there is no record showing that the EEOC "consulted" these doctors; (2) the record does not show that Dr. Hellegers was called as witness by the EEOC; (3) both Doctors Barter and Hellegers testified before the FCC only concerning the ability of pregnant females to remain at work prior to delivery (III App. 180-190, IV App. 1294-1308).
P. 108	States that before testifying before the FCC Dr. Hellegers cooperated with FCC in preparing key words to be placed in Medlars Computer retrieval system at the National Institutes of Health. Moreover, purports to summarize what was shown by the "medical literature retrieved by the Medlars Computer" at National Institute of Health.	As shown by footnote 35 of Respondents' brief, this is another gratuitous statement, having no record support whatever. Similarly, there is nothing in the record as to what, if anything, was retrieved by the Medlars Computer. See also, Brief *Amicus Curiae* filed in this case on behalf of Alaska Airlines, Inc., *et al.*, pp. 25, 26, 3a-6a, indicating that no medical studies were made by the EEOC prior to the issuance of the 1972 guideline on pregnancy.
P. 112	After citing various articles on sports and bicycling, Respondents' brief states that "[t]he EEOC *thus* had before it all the best available medical data when it issued its Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.10, April 2, 1971 . . ." [emphasis supplied].	This statement is illogical, unsupported by the record, and gratuitous.

Statements in Respondents' Brief		Comment
Pp. 138-139	Refers to the "defeated . . . Ervin Amendment which would have allowed legal distinctions between men and women based on physiological and functional differences."	The Ervin Amendment which is set forth at 118 Cong. Rec. 9317 states as follows: "This article will not impair, however, the validity of any laws of the United States or any State which exempts women from compulsory military service." This proposed amendment was defeated on March 21, 1972, at 118 Cong. Rec. 9336-9337.
P. 139	States that the actuary who testified at trial "rested his expertise on the fact that he had had twelve secretaries who became pregnant" (II App. 563).	This is a gross distortion of Actuary Jackson's testimony and demeans his expertise. See II App. 563. See also, Actuary Jackson's Curriculum Vitae at II App. 522-523 and App. 850-855.
P. 146	States that "GE supplied no figures as to claims paid for occupational injury."	GE was never asked by Respondents to do so.
P. 146	States that "[i]ndustrial studies uniformly show that the *rate* of absenteeism and disability claims decreases in inverse proportion to the increase in wage rates . . ." [emphasis supplied].	This statement is completely unsupported by the record. Respondents (Br. 148-149) cite in this connection a study dealing with the *duration* of claims.
P. 151	States that "[t]he cost of life insurance is substantially less for men."	This statement is supported neither by the record nor the sources expressly cited by Respondents. Indeed, it is clearly wrong.

Statements in Respondents' Brief	Comment
Pp. 1a-3a Sets forth for the years 1954, 1971 and 1974 a list entitled "Plans of 'Leading Firms in a Variety of Industries' which Pay Temporary Disability Benefits for Disability Arising Out of Pregnancy." For each of the three years the number of weeks covered for maternity are listed along with the page cite in that particular year's U.S. Dept. of Labor, Bureau of Labor Statistics digest.	The companies listed in Appendix A are only a carefully selected portion of the actual lists contained in the cited digests. Moreover, the list in Appendix A contains numerous errors. For example, under the column headed "1974," the following errors appear: the Brewers' Bd. of Trade is listed as providing 26 weeks of S and A for maternity whereas, in fact, the 26 weeks of coverage expressly *exclude* maternity; IBM is listed as paying 52 weeks of temporary disability benefits for maternity whereas it, in fact, provides only 52 weeks of paid sick leave with the BLS digest providing no specification as to whether maternity cases are or are not included; Pacific Maritime Ass'n. is listed as providing 6 weeks of S and A maternity benefits whereas, in fact, it provides 26 weeks of coverage for "non-occupational and occupational" cases with no specific reference to a 6 weeks maternity S and A benefit; RCA is listed as providing 8 weeks of S and A maternity coverage whereas, in fact, it provides 26 weeks of coverage for nonoccupational S and A but expressly excludes maternity; the Retail Trade Ind. is listed as providing 20 weeks of maternity S and A coverage whereas, in fact, it provides no S and A coverage at all.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
STANLEY R. STRAUSS
NINA G. STILLMAN
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN S. BATTLE, JR.
J. ROBERT BRAME, III
1400 Ross Building
Richmond, Virginia 23219

Attorneys for
General Electric Company

Of Counsel:

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

MCGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

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